



Office of Water Quality Wetland Water Quality Standards and 401 Certification Implementation Rulemaking

TOPIC PAPER: CREATION OF A STATE WETLAND PROGRAM IN THE WAKE OF SWANCC v. U.S. ARMY CORPS OF ENGINEERS

Purpose and Need for this Rulemaking:

On January 9th, 2001, the U.S. Supreme Court ruled against the U.S. Army Corps of Engineers and its authority to regulate certain isolated waterbodies (see Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers). While the Court's actual holding was narrowly limited to federal regulation of nonnavigable, isolated, intrastate waters based solely on the use of such waters by migratory birds, the Court's discussion was wider ranging. Some have interpreted the opinion as excluding from federal jurisdiction any isolated waterbodies that are not adjacent to waters of the United States. However, that interpretation is not consistent with the position taken in the joint memorandum issued by the U.S. EPA and the Corps on January 19, 2001.

The Supreme Court's decision removes certain water bodies from the jurisdiction of the U.S. Army Corps of Engineers. Generally, isolated waterbodies or wetlands that are not adjacent to waters of the United States may be affected by the SWANCC decision. Historically, Indiana has protected the state's waters, which include wetlands, by applying our water quality standards through the Department of Environmental Management's (IDEM) Section 401 Water Quality Certification program, in conjunction with the federal Section 404 U.S. Corps of Engineers permit program.

Due to the SWANCC decision, a Section 404 permit from the Corps of Engineers (and consequently a Section 401 state water quality certification) will not be required in those instances where a project might affect certain isolated water bodies that were formerly considered to be waters of the United States. However, the Supreme Court decision has no bearing on whether these water bodies are "waters" of the state subject to state law. Therefore, isolated water bodies will not cease to be waters of the state simply because they are no longer waters of the United States.

The Supreme Court decision did not question the states' authority to enforce their own statutes and regulations, and in fact, reaffirmed the states' primary authority to regulate its water resources and to control water pollution. IDEM is currently regulating all waters of the state, including those affected by the SWANCC decision, through application of existing state regulations (including the state's water quality standards).

IDEM is proposing to create a state wetland permitting program to cover water bodies and activities affected by recent federal court cases. IDEM believes that a permitting program can be established which will streamline the regulatory process, serve the public interest and clarify appropriate steps for the regulated community. This program would replace the recently established interim wetland NPDES permit and be complementary to the 401 water quality certification program.

Authority:

All waters of the state are subject to the water pollution control laws and regulations of the state of Indiana. These include, but are not limited to, water quality standards (which are set forth in 327 IAC 2) and the prohibition in 327 IAC 5-2-2 for discharging without a valid NPDES permit. Discharges of dredged or fill material to waters of the state, including wetlands, are likely to violate these provisions. The Water Pollution Control Board has broad authority under state law to adopt rules to prevent pollution and protect water quality. The establishment of a state wetland permitting program is consistent with this authority.

Proposed Revisions to the draft Section 401 Water Quality Certification Implementation Procedures to Create a State Wetland Regulatory Program:

Many states currently utilize dual wetland programs: a Section 401 Water Quality Certification Program for waters subject to federal jurisdiction and a state wetland regulatory program for waterbodies not covered by federal law. These programs do not add layers of regulation since their regulatory scope and authority cover different activities and/or types of waterbodies. Two states, Virginia and Tennessee, have dual programs that are most similar to the approach IDEM is initially advocating for this proposed rulemaking. In Virginia and Tennessee, a single review process was created, which is used to evaluate projects that need either a Section 401 Water Quality Certification or a state wetland permit. Public notice requirements, review criteria, mitigation requirements, and other relevant criteria are identical in each review.

For discussion purposes, IDEM proposes to modify the current draft 401 Water Quality Certification rule as follows:

- By inserting language creating a Surface Water Modification Permit Program.
- The need for this permit will only be triggered when a person proposes a project that will entail the placement of dredged or fill materials or excavation within waters of the state that are no longer considered waters of the United States.
- This permit will not be required for any project that is currently regulated by the Corps of Engineers under Section 404 of the Clean Water Act and IDEM's Section 401 Water Quality Certification.

Changes:

- This state permit program will regulate activities that may adversely affect water quality within all waters of the state that were previously but are not now considered waters of the United States under federal law.
- IDEM will, through this new program, regulate projects that would have been regulated by both IDEM and the Corps of Engineers under Sections 404 and 401 of the Clean Water Act before the SWANCC decision but no longer are.
- Major modifications to the rule would include revisions to the Purpose, Applicability, and Requirement sections of the draft Section 401 rule.
- IDEM contemplates the need to establish general permits for the Surface Water Modification Permit for minor activities. These general permits will parallel the existing regional general permits established by the Corps of Engineers.
- The proposed new program would have application, public notice procedures, administrative appeals and enforcement processes that are identical to the current proposed draft Section 401 procedures.

Implementation:

As IDEM has regulated these fills and waterbodies in this manner throughout the history of the 401 Program, IDEM anticipates that this permitting program can be implemented immediately upon adoption of the rule and will not have a measurable financial impact on the regulated community.



INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

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To: Interested Persons

From: Lori F. Kaplan
Commissioner

Date: June 5, 2001

Subject: NPDES Permit for Discharges of Dredged and Fill Material to Isolated Waters No Longer Subject to Federal Jurisdiction

Overview:

As noted in the memo dated April 11, 2001, IDEM Actions Related to SWANCC Supreme Court Decision, I stated that the Indiana Department of Environmental Management (IDEM) would develop an interim regulatory process to continue protection of water resources affected by the Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC) United States Supreme Court decision.

This memorandum states our intention to use IDEM's authority to implement the National Pollution Discharge and Elimination System (NPDES) permitting program and apply it to wetland fills. IDEM is using the NPDES permit as an interim measure to provide an enforceable mechanism to incorporate conditions that will assure the state's water quality standards and laws will be implemented. This approach is planned for use until the effective date of new rules authorizing a state wetland permit program. An NPDES permit, at this time, provides the best mechanism by which impacts to wetlands can be legally authorized, and also provides for a public process and a level of certainty for all citizens of Indiana.

Applicability:

All waters of the state are subject to water quality standards (which are set forth in 327 IAC 2) and other state laws and regulations. Discharges of dredged or fill material to waters of the state, including wetlands, are likely to violate these provisions. Indiana rules prohibit any discharge of a pollutant (which includes dredged or fill material) into waters of the state from a point source discharge (which includes bulldozers and backhoes) unless the discharger has obtained an NPDES permit or an exclusion applies. One of the exclusions is for discharges of dredged or fill material into waters of the state that are regulated under section 404 of the CWA. This exclusion does not apply to discharges into waters that are no longer subject to section 404 of the CWA. Therefore, a discharge of dredged or fill material into these waters is subject to the prohibition on discharging without an NPDES permit. Based on this, any activity that would result in the discharge of dredged or fill material into water bodies that are no longer subject to federal jurisdiction under the Clean Water Act (which appear to be those with no hydrological connection to other waters or other interstate commerce connection) will require an NPDES permit. Any project that requires a Section 404 permit from the Corps of Engineers and a Section 401 Water Quality Certification from IDEM will not require a separate NPDES permit.

Rationale:

The Supreme Court decision removed certain water bodies from the jurisdiction of the U.S. Army Corps of Engineers. While the Court's actual holding was narrowly limited to federal regulation of nonnavigable, isolated, intrastate waters based solely on the use of such waters by migratory birds, the Court's discussion was wider ranging. Some have interpreted the opinion as excluding any isolated waterbodies that are not adjacent to navigable waters of the United States. However, that interpretation is not consistent with the one taken in the joint memorandum issued by the U.S. EPA and the Corps on January 19, 2001.

Historically, Indiana has protected the state's waters, which include wetlands, by applying our water quality standards through our Section 401 Water Quality Certification program in conjunction with the Section 404 U.S. Corps of Engineers permit program. Although some of these waters may no longer be subject to federal jurisdiction, they are still waters of the state. IDEM will continue to protect all water bodies, including those affected by the SWANCC decision, by applying the state's water quality standards. The Supreme Court decision did not question the states' authority to enforce their own statutes and regulations, and in fact, reaffirmed the states' primary authority to regulate their water resources and control water pollution.

IDEM will pursue enforcement actions against persons who discharge pollutants, including dredged and fill material, into waters of the state in violation of state regulatory or statutory provisions. Persons need to obtain an NPDES permit to provide authorization for a discharge to wetlands no longer subject to federal jurisdiction. Obtaining and complying with this permit will provide a mechanism to avoid an enforcement action for illegal discharge.

Other Information:

The NPDES permit will be available for use beginning June 11 and is intended to be available until a state wetland permit program per a revised rule is established and effective. Please find enclosed a sample application and permit. Copies of this memo and attachments, as well as information on this approach, can be found on IDEM's website:

<http://www.in.gov/idem/water/planbr/401/401home.html>

IDEM is convening a workgroup to assist in drafting a proposed rule to establish a state wetlands permit program for isolated wetlands. The proposed rule will be presented to the Water Pollution Control Board for its consideration later this year.

If there are any questions regarding specific projects, please contact Dr. Dennis Clark at (317) 233-2482.



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To: Interested Persons

From: Lori F. Kaplan
Commissioner *Lori F. Kaplan*

Date: April 11, 2001

Subject: IDEM Actions Related to SWANCC Supreme Court Decision

The recent SWANCC v. United States Supreme Court decision removes certain water bodies from the jurisdiction of the U.S. Army Corps of Engineers. Generally, 'isolated waterbodies or wetlands' that are not adjacent to navigable waters of the United States are considered affected by the SWANCC decision. Historically, Indiana has protected the state's waters, which include wetlands, by applying our water quality standards through our Section 401 Water Quality Certification program, in conjunction with the Section 404 U.S. Corps of Engineers permit program.

Although some of these waters may no longer be subject to federal jurisdiction, they are still waters of the state. IDEM will continue to protect all water bodies, including those affected by the SWANCC decision, through the state's water quality standards. The Supreme Court decision did not question the states' authority to enforce its own statutes and regulations, and in fact, reaffirmed the states' primary authority to regulate its water resources and to control water pollution.

Due to the confusion caused by the SWANCC decision and the start of the construction season, it is important that IDEM clarify its position and approach relative to water bodies affected by the SWANCC decision. Accordingly, IDEM:

- 1) Will publish in a subsequent Indiana Register a statement related to its interpretation of state law as applied to water bodies affected by the SWANCC decision. Actions that may violate the state's water quality standards are prohibited for these affected water bodies. This statement is included as Attachment 1 and reflects IDEM's past and continued interpretation that Indiana's water quality standards apply to wetlands.
- 2) Recommends that individuals or entities that are involved in projects for water bodies covered by the SWANCC decision submit project plans and designs for IDEM review. IDEM will review these projects in a manner consistent with the Section 401 Water Quality Certification program and issue a letter with recommendations as to the types of actions needed to avoid future enforcement for violation of water quality standards. The application form is included as Attachment 2.

- 3) Pursue enforcement for violations of surface water quality standards as appropriate.
- 4) Begin discussions with interested persons to modify the current draft of the 401 Water Quality Certification procedures rule to establish a state permit system for water bodies affected by the SWANCC decision.
- 5) Draft an example NPDES permit for wetland fills. IDEM believes the existing NPDES permit rules apply to projects affected by the SWANCC decision. We are currently preparing a draft model NPDES permit for wetland fills and will share and discuss that with interested persons before proceeding with that approach. NPDES permits, issued as a stop-gap measure prior to the effective date of new rules authorizing a state wetland permit program, appear to provide the best mechanism by which impacts to wetlands can be legally authorized. Additionally, they will provide a public process and a level of certainty for the public and the regulated community.

IDEM will soon schedule a session with a group of interested persons to discuss the rulemaking as affected by the SWANCC decision.

If there are any questions regarding specific projects, please contact Dennis Clark at 317/233-2482.

Attachment 1

Effect of SWANCC Supreme Court Decision on Water Bodies in Indiana

On January 9, 2001, the United States Supreme Court issued a decision¹ affecting the federal government's jurisdiction under section 404 of the Clean Water Act (CWA). The Supreme Court held that the United States Army Corps of Engineers exceeded its authority under the CWA when it determined that abandoned intrastate gravel pits were "waters of the United States" on the sole basis that the waters were used as habitat by migratory birds.

IDEM is awaiting further guidance to be issued by the United States Environmental Protection Agency and the Corps of Engineers as to how they will implement the SWANCC decision. In the meantime, the public should be aware of how the case affects waters in Indiana.

First, many isolated water bodies including isolated wetlands (those with no hydrological connection to other waters or interstate commerce connection) that were formerly considered to be waters of the United States no longer will be. As a result, a section 404 permit from the Corps of Engineers (and consequently a section 401 state water quality certification) will not be required in those instances. *However, the SWANCC decision has no bearing on whether these water bodies are "waters" of the state subject to state law.* Therefore, isolated water bodies, including isolated wetlands, will not cease to be waters of the state simply because they are no longer waters of the United States.

Second, waters of the state are subject to water quality standards (which are set forth in 327 IAC 2) and other state laws and regulations. Discharges of dredged or fill material to waters of the state, including wetlands, are likely to violate these provisions.

Third, Indiana rules prohibit any discharge of a pollutant (which includes dredged or fill material) into waters of the state from a point source discharge (which includes bulldozers and backhoes) unless either the discharger has obtained an NPDES permit or an exclusion applies. One of the current exclusions is for discharges of dredged or fill material into waters of the state that are regulated under section 404 of the CWA. However, this exclusion does not apply to discharges into waters that are no longer subject to section 404 of the CWA. Therefore, a discharge of dredged or fill material into the isolated waterbodies or isolated wetlands is subject to the prohibition on discharging without an NPDES permit.

Fourth, IDEM may pursue enforcement actions against persons who discharge pollutants, including dredged and fill material, into waters of the state in violation of state regulatory or statutory provisions. These persons are also subject to third party actions.

¹Solid Waste Association of Northern Cook Counties v. United States Corps of Engineers, 121 S.Ct. 675 (2001) ("SWANCC").